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No. 79-391

# In the Supreme Court of the United States

OCTOBER TERM, 1979

DAVID LEE LUKEFAHR, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. J) is reported at 595 F. 2d 1086.

### JURISDICTION

The judgment of the court of appeals was entered on May 24, 1979. A petition for rehearing was denied on July 10, 1979. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to September 8, 1979, and the petition was filed on September 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether pre-trial publicity gave rise to prejudice against petitioners that required a change of venue under Fed. R. Crim. P. 21(a).

2. Whether the voir dire conducted by the district court resulted in the selection of an impartial jury.

3. Whether the district court properly questioned the jury concerning a newspaper article published during the course of the trial.

4. Whether the prosecutor commented improperly during his summation on petitioners' exercise of their right to remain silent.

**STATEMENT**

Following a jury trial in the United States District Court for the Northern District of Florida, petitioners David Lukefahr, Stephen Lukefahr and Thomas Lukefahr, and co-defendant David Capo, were convicted on one count of conspiracy to possess marijuana and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 846 and 841(a)(1). All three petitioners were sentenced to consecutive five-year prison terms and a fine of $15,000 on each count. The court of appeals affirmed (Pet. App. J).

The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioners participated in a conspiracy to smuggle marijuana into the United States. They executed the plan in January 1977 by landing a 70-foot shrimp boat, laden with several tons of marijuana, on the Florida panhandle coast. Petitioners thereafter participated in the process of unloading the vessel (Pet. App. J-3).

During the course of the unloading operation, two men and two women happened onto the scene and were fatally shot by the conspirators. Their bodies were



transported to Taylor County, Florida, wired to concrete blocks, and thereafter dumped into a deep sinkhole (Pet. App. J-3).[1]

Prior to trial, counsel for petitioners moved for a change of venue pursuant to Fed. R. Crim. P. 21(a), contending that prospective jurors had been prejudiced by pre-trial publicity. At the hearing on this motion, petitioners tendered certain media reports describing the smuggling operation and related murders. The district court denied the motion (Pet. App. J-3).

Prior to the commencement of trial, the district court undertook an exhaustive voir dire examination extending over 10 days. Each potential juror was questioned individually in camera by the court, and counsel were invited to submit additional questions when the court's examination was completed. During the course of this examination, petitioners exercised all of their peremptory challenges and the court granted 10 additional challenges for cause directed to persons who appeared to have been prejudiced by pre-trial publicity. Each of the jurors selected had some knowledge of the sinkhole murders based on past media reports, but each repeatedly pledged his or her impartiality and ability to render a fair verdict (Pet. App. J-3).

**ARGUMENT**

1. Petitioners contend (Pet. 14-59)[2] that the existence of pre-trial publicity concerning their smuggling operation and the resulting murders made a fair trial impossible,

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[1]Petitioners and their co-conspirators were subsequently indicted in state court for murder. Following their conviction in federal court, the state murder charges against petitioners were dropped. However, two other participants in the smuggling conspiracy were subsequently convicted in state court of first degree murder (*ibid.*).

[2]We address only the principal points and authorities raised in petitioners' 82 page petition, a document which fails to comply with Rule 23(4) of the Rules of this Court.

and that the district court was required to grant a change of venue without attempting to ascertain through voir dire examination whether an impartial jury could be selected. They also contend that federal standards in this area are inadequate, and that the approach of the court of appeals departs from that of other courts.

The standard governing motions for changes of venue is specified in Fed. R. Crim. P. 21(a):

> The court upon motion of the defendant shall transfer the proceeding as to him to another district * * * if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Proper application of this standard requires an assessment of the facts of the particular case, an assessment undertaken by both courts below (see Pet. App. A-4 to A-6). Petitioners have failed to demonstrate an abuse of discretion in evaluating these facts.

Based on its review of the record and exhibits submitted by petitioners, the court of appeals concluded that no showing had been made of prejudicial publicity that would give rise to a presumption of prejudice on the part of potential jurors. The court explained (Pet. App. J-5; footnote omitted):

> The trial was held at Tallahassee over 100 miles from Sandy Creek, the site of the crimes, and some distance from the sinkholes where the bodies were discovered. It began almost a year after the occurrence of the alleged offenses. By this time, local news coverage of the conspiracy and the murders had subsided substantially. This is evidenced by the fact



> that at voir dire most of the prospective jurors and many of the jurors had only a vague recollection of the events that had transpired at Sandy Creek. Moreover, most of the prospective jurors could not recall the name of any person who was accused of participating in the offenses. Given these facts, we fail to perceive the degree of pervasive community prejudice which would warrant a presumption of jury prejudice.

The court of appeals recognized that it was obliged to make "an independent evaluation of the special circumstances involved in the case" to determine whether "highly inflammatory publicity or intensive media coverage" resulted in "presumptive prejudice" (Pet. App. J-4). However, based on its independent review, the court concluded that the present case was wholly unlike cases such as *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Estes* v. *Texas*, 381 U.S. 532 (1965), in which a single defendant was the focus of highly inflammatory publicity and intensive news coverage.[3] In contrast to those cases, petitioners were only part of a 15 person conspiracy and were not the subjects of individual attention by the media. Moreover, the newspaper articles in question were objective in nature. See Pet. App. D-3 to D-5. See also *Calley* v. *Callaway*, 519 F. 2d 184, 206 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976).[4]

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[3]See also *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), in which a confession illegally obtained from the defendant was repeatedly broadcast by television in the community where the trial took place.

[4]Contrary to petitioners' assertion (Pet. 19), the court of appeals did not find that the pre-trial publicity was "prejudical" in nature. The court did find that publicity had been prevalent (Pet. App. J-3), but it also found an absence of resulting community prejudice that would warrant a "presumption" that careful voir dire procedures would be ineffective in screening out biased jurors.

Although petitioners argue that the press reports concerning their smuggling operation were inherently prejudicial because they included information about prior convictions and guilty pleas on similar charges (Pet. 20), the articles on which they rely do not support such contentions. Significantly, the articles (Pet App. D) do not describe petitioners by name. While the articles do mention that one of the individuals charged in the crimes (James Davison, an alias used by petitioner Thomas Lukefahr) was currently serving a jail sentence (Pet. App. D-3), the articles contain no indication that "James Davison" and "Thomas Lukefahr" are the same person. Since this fact would not otherwise be apparent to readers of the newspaper article, the problem presented in *Marshall* v. *United States*, 360 U.S. 310 (1959), in which jurors actually read articles during trial recounting the defendant's prior felony convictions, did not arise.

Petitioners also argue (Pet. 18 and *in passim*) that additional standards are required in this area and that a change of venue should be granted whenever there is a "probability of prejudice."[5] However, this standard does not appear to be materially different from the standard used by the court below, which inquired whether, based

[5]The principal authority relied on by petitioners, ABA *Standards Relating to Fair Trial and Free Press* §3.2 (1968), provides that a motion for "change of venue or continuance" shall be granted when the trial court determines that dissemination of potentially prejudicial material gives rise to "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." This discretionary standard is substantially identical to Fed. R. Crim. P. 21(a) and the case law applied by the court of appeals here. The case of *Commonwealth* v. *Casper*, 375 A. 2d 737 (Pa. Super. Ct 1977), also relied on by petitioners, simply requires a careful analysis of the special facts of the particular case, an analysis nearly identical with that undertaken here. Compare 375 A. 2d at 743 and Pet. App. J-3 to J-6.



on all the facts and circumstances of the case, pre-trial publicity was so inherently prejudicial that bias on the part of jurors must be presumed.[6]

On the facts presented in this case, the trial judge did not abuse his discretion by denying petitioners' motion for a change of venue and by proceeding to determine if an unbiased jury panel could be selected through customary voir dire procedures. See *United States* v. *Gullion*, 575 F. 2d 26 (1st Cir. 1978); *United States* v. *Haldeman*, 559 F. 2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Jones*, 542 F. 2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Pamplin* v. *Mason*, 364 F. 2d 1, 6 n.9 (5th Cir. 1966). As the court of appeals observed in *United States* v. *Haldeman*, *supra*, 559 F. 2d at 63; footnote and emphasis omitted: "[A] supervisory fair trial standard, however stated, could not stimulate the court to additional vigilance in protecting the defendant's right to be tried on the evidence presented in court. And if an impartial jury actually cannot be selected, that fact should become evident at voir dire." See also *Dobbert* v. *Florida*, 432 U.S. 282, 301-303 (1977), rejecting the contention that the "quantum of publicity" surrounding the defendant's offense made it impossible to select a fair and impartial jury.

2. Petitioners also argue that the jury was biased because its members had some knowledge of the murders which resulted from their drug smuggling activities. In these circumstances, petitioners contend, the trial court should not have relied on assurances from the jury that they could render an impartial verdict (Pet. 45-47).

[6]Although petitioners contend that the court of appeals applied a "mockery of justice" standard in this case (Pet. 3), it is clear that the court merely used that expression in the course of analyzing the facts presented here and contrasting this case with other cases in which pre-trial publicity was alleged to have resulted in a total miscarriage of justice. See *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975).

However, it is well settled that a defendant is not entitled to a trial by a body of jurors ignorant of all facts surrounding the case, a standard that would be impossible to achieve in many instances. Rather, the defendant is entitled to receive a trial from an impartial jury that will render a verdict based solely on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). No court has ever held that the only impartial jury is a jury completely ignorant of the facts surrounding a case. See *Dobbert* v. *Florida*, *supra*, 432 U.S. at 301-302. As this Court emphasized in *Irvin* v. *Dowd*, *supra*, 366 U.S. at 722-723: "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public * * * and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases." The Court added that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." This standard was fully satisfied here.

As explained by the court of appeals following its independent review of the facts (Pet. App. J-5):

> Appellants * * * have failed to show any prejudice in fact. Rather, the record discloses that the district court took elaborate measures to ensure that an impartial jury was empaneled.
>
> At the commencement of the proceedings, the court conducted a collective voir dire of all prospective jurors, inquiring as to their ability to render an impartial verdict. The veniremen were carefully instructed to decide the case strictly on the evidence presented at trial. The trial judge further admonished them not to discuss the case with anyone, including family members, and not to read any newspaper articles concerning the trial or listen to radio or television accounts of the proceedings.
>
> The court then conducted an individual voir dire of each of the 73 prospective jurors *in camera* * * *. During the voir dire the trial judge propounded those questions requested by the defense. Each juror was questioned at length concerning the extent of his or her knowledge of the sinkhole murders, the details surrounding the crime * * * and the names of the alleged perpetrators. Each juror was then questioned repeatedly whether he or she had formulated any preconceived notions on the basis of this knowledge and whether he or she was capable of rendering a fair and impartial verdict based on the evidence.[7]



Each of the jurors who appeared to have opinions that would impair his or her impartiality was dismissed for cause (Pet. App. J-5). Moreover, each juror who was selected to sit in this trial repeatedly stated that he or she had no opinion as to the guilt or innocence of petitioners. See 4 Supp. R. 18-24, 124-125, 144-147, 162-163; 8 R. 23, 96, 100, 104, 121; 9 R. 74, 82; 10 R. 47, 54, 82, 211, 224, 383, 392.[8] Thus, the jury selected in this case was far different from that in *Irvin* v. *Dowd*, *supra*, where eight of the 12 jurors believed prior to trial that the defendant was guilty. Here, as in *Murphy* v. *Florida*, *supra*, the exposure of the jurors to some pre-trial publicity "by no means suggests a community with

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[7] As the court of appeals noted, most of the prospective jurors could not recall the names of any of the persons who allegedly had been involved in the crimes in question (Pet. App. J-5).

[8] "Supp. R." refers to the supplemental record filed in the court of appeals; "R." refers to the original record. The volumes of the trial transcript were not numbered in consecutive order. See Pet. App. I.

sentiment[s] so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." 421 U.S. at 803.[9]

3. Petitioners further contend (Pet. 59-77) that the trial court failed to properly question the jury panel concerning possible exposure to a newspaper article published during trial. On the third day of trial, petitioners advised the court that a newspaper article had appeared as the headline story in a local newspaper, the Tallahassee Democrat. The article's headline read "Convicts lived it up here—while they could," and a subheading stated "Witness recounts threats on life" (Pet. App. E-2). The article also discussed petitioners' prior

[9]Petitioners argue that the ABA *Standards Relating to Fair Trial and Free Press* §3.4(b)(1968), should have been applied in this case. Section 3.4(b) provides:

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters, that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind.

But none of the jurors who was empaneled in this case possessed "incriminating" information or information that was "inflammatory" with respect to petitioners. The voir dire examination sufficed to "ferret out any possible prejudice" of this kind (Pet. App. J-6 n.6).

Petitioners' reliance on *Silverthorne* v. *United States*, 400 F. 2d 627 (9th Cir. 1968), and *United States* v. *Williams*, 568 F. 2d 464 (5th Cir. 1978), is equally misplaced. In *Silverthorne*, the court held that a collective voir dire examination, in which prospective jurors were asked only four general questions regarding their knowledge of the case, was insufficient to assure a fair trial in a highly publicized proceeding. The 10 day individual voir dire examination in this case cannot be compared to that found deficient in *Silverthorne*. In the *Williams* case, in contrast to the present case, it was established that an "inherently prejudicial" news report of the defendant's prior convictions had reached five members of the jury during the course of the trial.



convictions on drug charges. After reviewing the article, the trial judge stated that he would inquire of the jury collectively whether any member had "read or heard anything about the case over the weekend." If he received any affirmative response, he would subsequently conduct an individual inquiry in camera (Pet. App. J-6). The jurors were then brought into the courtroom and the trial judge asked them three separate times whether they had read any headlines or articles over the weekend about the trial or watched any television programs dealing with the subject. Each time the court phrased the question differently to avoid any possibility of misunderstanding. Each time the panel responded in the negative (*id.* at J-6 to J-7).

Considering the pre-trial safeguards instituted by the trial judge and his repeated examination of the panel, petitioners could not have been prejudiced by the newspaper article. Moreover, at every recess the trial judge admonished the jury to refrain from reading or listening to anything that concerned the case (*id.* at J-7.) And in his final instructions, the court again reminded the jury that the verdict must be based solely on the evidence (*ibid.*). Further inquiry of individual members of the jury panel was not required under these circumstances. See *United States* v. *Herring*, 568 F. 2d 1099, 1104-1105 (5th Cir. 1978); *United States* v. *Jones*, 542 F. 2d 186, 194 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

Nor is there merit to petitioners' argument that the court was required to ignore the denial by the jury, a denial repeated three different times in response to three differently phrased questions. Despite the fact that some of the jurors subscribed to the newspaper in question, and some *prospective* jurors disregarded the court's warning against talking about the case (Pet. 64), there is no reason to discredit the repeated assurances of the panel actually selected that it had not seen the article. Here, as in *Opper*

v. *United States*, 348 U.S. 84, 95 (1954), there is no justification for indulging in "unfounded speculation that the jurors disregarded clear instructions of the court" requiring them to avoid considering extraneous matter.[10]

4. Petitioners finally contend (Pet. 78) that the prosecutor improperly commented on their post-arrest silence during closing argument. The court of appeals correctly held that, viewed in context, the prosecutor's remarks were not directed toward petitioners' silence. There is no reason for further review of this essentially factual question.

Contrary to petitioners' assertion, their counsel contended before the jury that his clients were led to commit the crimes charged against them due to the activities of Bobby Vines, a government informant (11 Supp. R. 175-178). Moreover, defense counsel devoted a significant portion of their closing argument to attacking Vines' credibility (Pet. App. J-8). In rebuttal, the prosecutor contended that Vines' testimony was truthful, and contrasted Vines with three of petitioners' co-conspirators, Chris Goodwin, Steve Long, and Bill Epperson. He observed that these three had various opportunities to exculpate themselves, to withdraw from the conspiracy, and to cooperate with the government in the same manner as Bobby Vines. Instead, however, they chose to lie to the authorities. The prosecutor argued this point to the jury as follows (Pet. App. J-8 to J-9; emphasis omitted):

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[10] *United States* v. *Lord*, 565 F. 2d 831 (2d Cir. 1977), relied on by petitioners, does not support their contrary contention. In *Lord*, the court observed that an individual voir dire may not be required if the possibility of jury exposure to an article is remote. 565 F. 2d at 838-839. Because the trial judge is in the best position to assess the possibility of jury misconduct or prejudice, his broad discretion in dealing with such problems has been emphasized repeatedly. See, *e.g.*, *United States* v. *Bufalino*, 576 F. 2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Hendrix*, 549 F. 2d 1225, 1227-1229 (9th Cir. 1977).



> I clearly stated and I will clearly state it again that no one, when they were being enticed in this thing, indicated, hey, look, I don't want to participate. I'm a lawabiding citizen. Everyone readily went into it. No indication that they were going to tell the police or become an informant. Now isn't it interesting, Mr. Mann, representing Chris Goodwin, came in here and he asked you why is Bobby Vines testifying. Well, why didn't Chris Goodwin when he had four big opportunities a long time ago, you know, back in February and April and all the times that we indicated he was interviewed by as many as five law enforcement officers, why didn't he say okay, you want me to testify, I will tell you everything that happened? No, he lied. He lied everytime. The officers went to him because they could locate him and they thought he was involved. And on three occasions he lies to them. They go to Steve Long because he was involved a long time ago and Steve Long lied to them.
>
> And they went to Bill Epperson, because they thought he was involved, and Bill Epperson lied to them.
>
> Now its a shame that we have to call Bobby Vines in here. That is a shame. But Bobby Vines at least took the stand and told us what happened. These other guys had the opportunity.

When defense counsel objected to this argument as a tacit comment on their clients' failure to testify, the prosecutor explained that his statement was only directed to the defendants' predisposition to commit the offenses and their reluctance to assist the government (Pet. App. J-8).

Rather than constituting a comment on petitioners' failure to testify at trial or on their post-arrest silence, the argument of the prosecutor represented an attempt to bolster the credibility of Vines by contrasting his honest cooperation with federal officials with the misrepresentations of other members of the conspiracy. As the court of appeals found, this was responsive rebuttal argument (Pet. App. J-8 to J-9). Significantly, petitioners were not even mentioned in this part of the closing argument. It could not have been understood as a comment on their silence.

In these circumstances, petitioners' reliance on *Doyle* v. *Ohio*, 426 U.S. 610 (1976), is wholly misplaced. *Doyle* establishes that post-arrest silence following a *Miranda* warning has little evidentiary value and should not be used for impeachment purposes at trial. In this case, however, the prosecutor did not comment on petitioners' post-arrest silence following a *Miranda* warning. Instead, the prosecutor contrasted the mendacity of petitioners' co-conspirators with the honesty of a government witness. *Doyle's* concern over the "fundamental[] unfairness" (426 U.S. at 618) of advising a defendant of his right to remain silent and then using that silence against him is not applicable here.[11]

[11]Contrary to petitioners' contention, the government explained the context and meaning of the prosecutor's closing argument in its brief in the court of appeals. See Govt. Br. 33-34.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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